PP

v.

LEILA FATEMI & ANOR

HIGH COURT MALAYA, PULAU PINANG
MOHD AMIN FIRDAUS JC
[CRIMINAL APPEALS NO: 45-45-09-2011 & 45-46-09-2011]
28 FEBRUARY 2013

EVIDENCE: *Statement - Unsworn statement from dock - Probative value - Sufficiency of - Whether court took into consideration prosecution's evidence - Whether unsworn statement carried full probative value - Whether court viewed evidence objectively from all angles*

The two accused persons herein, *ie*, Sahar Mohammadi ("SM") and Leila Fatemi ("LF") were originally charged for trafficking in dangerous drugs. In her unsworn statement from the dock, SM alleged that her fiancée ('Farhan') had given her two bags in which the drugs were hidden. Farhan was alleged to have checked-in the bags at the airport where SM and LF had first boarded the aircraft. SM further contended that she had no means of knowing the existence of the drugs concealed inside the bags. Similarly, in her unsworn statement from the dock, LF mentioned that the two bags which contained the hidden drugs were given by Farhan and he was the one who had checked-in the bags. LF further contended that she was unaware of the presence of the concealed drugs inside her bag. The issue that arose for consideration was whether the unsworn statement of each accused from the dock carried sufficient probative value to show that the two accused persons were not drug traffickers.

Held (convicting and sentencing both accused persons for having custody and/or control of the dangerous drugs under s. 12(2) Dangerous Drugs Act 1952):

(1) The unsworn statements were still evidence although they did not carry full probative value. Nonetheless, the decision taken by the court was not based entirely on the contents of the two unsworn statements but it also took into consideration the

A evidence adduced by the prosecution itself. In *Ng Hoi Cheu v. PP*, the court viewed that an unsworn statement from the dock was evidence and the Court of Appeal in *Azahar Mohd Aminillah v. PP* endorsed the said view. (para 9)

B **(2)** The prosecution did not re-examine the subject matter "Farhan" which formed the basis of the defence for SM and indirectly for LF. When the prosecution did not re-examine such an important aspect of the defence, it was deemed that it had accepted the testimony of the investigating officer with C regards to the person called "Farhan" to be true. Further, the investigation officer did not make any effort to trace "Farhan". No details were elicited from SM about "Farhan" on whether he was in Penang or in Iran on 19 February 2011, *ie*, the date the accused persons' were arrested. Hence, there was D incontrovertible evidence that the man called "Farhan" did exist and was not a fictitious character. (paras 16, 19 & 27)

(3) The court must view the whole evidence objectively from all angles and not be prejudiced by the fact that both accused persons had been to Penang twice before their arrest. In E accordance with *PP v. Azwan Irewan Rosni*, the evidence adduced by the prosecution did not show any overt act on the part of both LF and SM to prove the element of the offence of trafficking. Instead, the court reduced the charge to F one under s. 12(2) of the Dangerous Drugs Act 1952 whereby both accused were found to only have custody and/ or control of the dangerous drugs. Each accused was sentenced to eight years' imprisonment with effect from the date of their arrest. (paras 26, 29 & 30)

G **Case(s) referred to:**
Aedy Osman v. PP [2011] 1 CLJ 273 FC ***(refd)***
Azahan Mohd Aminallah v. PP [2005] 1 CLJ 374 CA ***(refd)***
Chee Chiew Heong v. PP [1981] CLJ 43; [1981] CLJ (Rep) 122 HC ***(refd)***
Mohamad Yazri Minhat v. PP [2003] 2 CLJ 65 CA ***(refd)***
H *Ng Hoi Cheu & Anor v. PP [1967] 1 LNS 113 HC* ***(refd)***
PP v. Ang Soon Huat [1990] 1 LNS 103 HC ***(refd)***
PPv. Azwan Irewan Rosni [2009] 2 CLJ 536 HC ***(refd)***
PP v. Hafiszamri Ahmad & Anor [2007] 1 CLJ 285 CA ***(refd)***
PP v. Tan Kim Piow [2006] 3 CLJ 717 CA ***(refd)***
Sia Soon Suan v. PP [1965] 1 LNS 1654 FC ***(refd)***
I *Wjchai Onprom v. PP [2006] 3 CLJ 724 CA* ***(refd)***
Wong Swee Chin v. PP [1980] 1 LNS 138 FC ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 12(2), 39A(2), 39B

For the 1st accused - Harpal Singh; M/s Harpal Singhn & Co
For the 2nd accused - Mohd Ismail Mohamed (Noraishah Mohd Ismail with him); M/s Ismail, Khoo & Assoc

Reported by Kumitha Abd Majid

JUDGMENT

Mohd Amin Firdaus JC:

Case Background

[1] On the 23 February 2012, at the end of the prosecution case, the court found that the prosecution had failed to make out a *prima facie* case against both the accused persons in the joint trial.

[2] Both accused persons were acquitted and discharged without their defence being called.

[3] The prosecution appealed against the said decision and the Court of Appeal allowed the appeal and remitted their cases to this court with the directive to call for their defence.

[4] On the 4 October 2012, after the defence of each accused was called, both accused chose to give unsworn statements from the dock.

[5] At the end of the case for the defence, after the court had evaluated the unsworn statement (D39) of Leila Fatemi (LF) and the unsworn statement (D40) of Sahar Mohammadi (SM), together with the submissions by both the learned defence counsels and the learned Deputy Public Prosecutor, it found that the prosecution had failed to prove its case against each accused beyond reasonable doubt in relation to the original charge of drug trafficking. Instead the court made a finding for custody or control of dangerous drug under s. 12(2) of the Dangerous Drugs Act 1952 (Act 234) and punishable under s. 39A(2) of the same Act.

[6] The court then reduced the charge accordingly, and found both the accused guilty of the lesser charge and convicted them. Each of the accused was sentenced to eight years imprisonment with effect from the date of their arrest that is 19 February 2011.

[7] The prosecution being dissatisfied with this decision, again filed an appeal against it to the Court Of Appeal.

Issue

[8] Does the unsworn statement of each accused from the dock carry sufficient probative value to show that the two accused were not drug traffickers?

[9] In *Ng Hoi Cheu & Anor v. PP* [1967] 1 LNS 113; [1968] 1 MLJ 53 (HC), the court viewed that an unsworned statement from the dock is evidence and the Court of Appeal in the case of *Azahan Mohd Aminallah v. PP* [2005] 1 CLJ 374; [2005] 1 CLJ 374 CA [2004] 6 AMR 810 (CA) endorsed the view of the High Court. The unsworn statements D39 and D40, are still evidence although they do not carry full probative value. Nonetheless, the decision taken by the court was not based entirely on the contents of the two unsworn statements but it also took into consideration the evidence adduced by the prosecution itself.

[10] In the case of *Sia Soon Suan v. PP* [1965] 1 LNS 1654; [1966] 1 MLJ 16 (FC) Ong Hock Thye A-G CJ held:

> It is trite law that the requirements of strict proof in a criminal case cannot be relaxed to bridge any material gap in the prosecution evidence. Irrespective of whether the court is otherwise convinced in its own mind of the guilt of innocence of an accused, its decision must be based on the evidence adduced and nothing else.

Reason For Reducing The Charge To One Under s. 12(2) Read With s. 39A(2) Of The Dangerous Drugs Act 1952 (Act 234)

[11] When the investigating officer I/ Mohd Ismail bin Abdul Wahab (PW12) was being cross-examined by the learned defence counsel Mohd Ismail bin Mohamed for the accused Sahar Mohammadi (SM) that in her statement she did mention the name of a man called "Farhan" to him, PW12 answered in the positive. When PW12 was further cross-examined on whether he had tried

to trace "Farhan", this investigating officer answered only through the telephone, the number which he saw from the hand phone of SM.

[12] PW12 was then asked did he resort to other means to trace "Farhan". He answered "No."

[13] In the unsworn statement from the dock of SM (D40), she said that the two bags (exhs. P17 and P18) with drugs hidden inside secret compartments were given to her by her fiance called "Farhan" who was supposed to marry her later. Farhan checked in the bags at the airport where SM and LF first boarded the aircraft.

[14] SM had no means of knowing the existence of the drugs concealed inside the bags.

[15] In her unsworn statement from the dock (D39), the accused Leila Fatemi (LF) mentioned that the two bags containing the hidden drugs were given by SM's fiance by the name of "Farhan" and he was the one who had checked in the bags. LF said that she did not know of the presence of the concealed drugs inside her bag and she just accompanied SM to Malaysia on her request because she is still single.

[16] It is noteworthy to say that the learned Deputy Public Prosecutor did not re-examine at all on the subject - matter "Farhan" which froms the basis of the defence for SM and indirectly for LF. When the prosecution did not re-examine such an important aspect of the defence for SM and ultimately also for LF, it is deemed that it had accepted the testimony of PW12 in regard to the person called "Farhan" to be true.

[17] In *Wong Swee Chin v. PP* [1980] 1 LNS 138; [1981] 1 MLJ 212 (FC) the Federal Court held:

> There is a general rule that failure to cross-examine (to draw an anology, also to re-examine) a witness on a crucial part of the case will amount to acceptance of the witnesses testimony.

[18] In this case the failure of the learned Deputy Public Prosecutor to re-examine on such a crucial part of her case did not fall under any exceptions to the general principle.

[19] Hence, there is now incontrovertible evidence that the man called "Farhan" does exist and is not a fictitious character.

[20] In *PP v. Hafiszamri Ahmad & Anor* [2007] 1 CLJ 285; [2007] 1 MLJ 49 (CA) the Court of Appeal held that, "An accused is entitled to the benefit of anything which can be elicited from the prosecution evidence".

[21] In *Chee Chiew Heong v. PP* [1981] CLJ 43; [1981] CLJ (Rep) 122; [1981] 2 MLJ 287 (HC) the court held that a presumption can be rebutted from the evidence adduced by the prosecution.

[22] In *Aedy Osman v. PP* [2011] 1 CLJ 273 (FC), one of the issues raised was whether there was another person called "Kassim" the real drug trafficker who put the incriminating drugs into the red bag carried by the appellant/accused?

[23] In relation to this issue, the Federal Court held:

> From the authorities cited by the appellant's counsel, it is incumbent upon the prosecution to call evidence to rebut any claim which is relevant and material by the defence in the course of cross-examination of the prosecution witnesses than risking dismissal of its case for want of proof. In *PP v. Iskandar Mohamad Yusof* [2006] 6 CLJ 379, *Chow Kok Keong v. PP* [1998] 2 CLJ 469, *Yee Wen Chin v. PP & Another Appeal* [2008] 6 CLJ 773, it was held that if there is evidence adduced to demonstrate that someone else rather than the accused was the real trafficker, then the trial judge should give due consideration to this before arriving at a decision to convict the accused. But the common thread among these authorities is that the accused had relied on some creditable evidence that another person was the real culprit. In *Mohamad Radhi Yaakob v. PP*, the accused was walking along the main road with one other person who was identified as Hashim. Hashim escaped while the accused threw the bag he was carrying which was later found to contain the incriminating drugs. The accused claimed that he was an innocent carrier and Hashim was the real culprit. Since there was sufficient evidence to prove the existence of Hashim, the accused had his conviction for trafficking set aside and replace with one for possession. In *Chow Kok Keong v. PP*, again there was evidence to indicate the existence of another person who handed the bag to the accused that led the Federal Court to substitute a conviction of trafficking to that of possession. The same sort of facts appears in both *Yee Wen Chin v. PP & Anor.* and *PP v. Iskandar Mohamad Yusof.*

[24] In *PP v. Azwan Irewan Rosni* [2009] 2 CLJ 536 Jeffery Tan J (as His Lordship then was) held: A

> In *Y Jeyamurally a/l Yesiah v. PP* [2007] 5 MLJ 224 (CA), the Court of Appeal held that the evidence only established the appellant was in custody and control of the dangerous drugs but not of some other overt act. B

[25] His Lordship further mentioned the case of "*Mohamad Yazri Minhat v. PP* [2003] 2 CLJ 65 which was cited in both *PP v. Tan Kim Piow* [2006] 3 CLJ 717 (CA), and *Wjchai Onprom v. PP* [2006] 3 CLJ 724 (CA) to support the proposition that C there must be *mens rea* possession accompanied by some overt act to constitute trafficking under s. 39(B) of the Act".

[26] First, on the authority of the Federal Court case in *Aedy Osman v. PP*, who was the real drug trafficker in this case, both D SM and LF or "Farhan"? The court must view the whole evidence objectively from all angles and not being prejudiced by the fact that both accused before their arrest had been to Penang twice.

[27] The prosecution did not challenge the person called E "Farhan" who as claimed by SM is her fiance to be a fictitious character. Neither did the investigating officer made an effort to trace him. No details were elicited from SM about "Farhan" on whether he was then in Penang or in Iran on the 19 February 2011 (the date of her arrest) his address, his friends, or etc. F

[28] In *PP v. Ang Soon Huat* [1990] 1 LNS 103; [1991] 1 MLJ 1 (HC) (S'pore) Chan Sek Keong and Chua JJ applied the principle "that where the court is on the evidence, left in doubt as to whether the accused has committed an offence in a lower G or a higher degree of seriousness, the court should make a finding in the lower degree, particularly in a case in which a finding in a higher degree will give rise to a mandatory sentence of a death."

[29] Apart from the issue of real trafficker, in accordance with the H case of *PP v. Azwan Irewan Rosni*, the evidence adduced by the prosecution did not show any overt act on the part of both the accused LF and SM to prove the element of the offence trafficking.

I

[30] Therefore all in all, including considering the submissions by all parties, the court came to the findings that both accused had only custody and/or control of the drugs. Thus, the findings on possession.